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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 680

VINCENT GIGANTE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Vincent Gigante prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, reaffirming after remand by this Court the orders of the United States District Court for the Southern District of New York denying petitioner's motion for a new trial.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is printed as Appendix A to this petition (App. 1a-21a). The prior opinion of the court of appeals is reported *sub nom United States* v. *Aviles*, 315 F. 2d 186

(2d Cir. 1963), *vacated and remanded sub nom Evola* v. *United States,* 375 U.S. 32 (1963). The opinions of the district court are reported *sub nom United States* v. *Aviles,* 197 F. Supp. 536 (S.D.N.Y. 1961) (per Judge Bicks) and 200 F. Supp. 711 (S.D.N.Y. 1961) (per Judge Murphy).

JURISDICTION

The prior judgment of the court of appeals was vacated by this Court on October 21, 1963. *Gigante* v. *United States,* No. 197, Oct. T. 1963, decided with *Evola* v. *United States,* 375 U.S. 32 (1963). The judgment of the court of appeals upon remand was entered on October 16, 1964 (App. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED[1]

1. Whether the action of the court of appeals upon the remand herein was consistent with this Court's mandate.

2. (a) What is the proper definition of the term "substantially verbatim" as used in the Jencks Act, 18 U.S.C. § 3500(e)(2).

(b) Whether notes properly found by a district court as a matter of fact to "set forth in substance what the witness said" may be held by an appellate court as a matter of law not to be "substantially verbatim".

3. Whether in a post-trial proceeding the government is estopped, by its violation of the trial court's

[1] The questions presented are the same as those in the petition of petitioner Vito Genovese, who seeks a writ of certiorari from the same judgment below.

order governing production of documents under the Jencks Act, from claiming the benefit of a more favorable standard of producibility than was applicable at the time of trial.

4. Whether pre-trial destruction of a government agent's interview notes, arguably within 18 U.S.C. § 3500(e), warrants invocation of sanctions under § 3500(d) or otherwise:

(a) where the agent testifies that he destroyed his notes in accordance with regular practice;

(b) where the agent testifies that he destroyed his notes deliberately in order to circumvent the Jencks rule.

5. Whether, as to a petitioner convicted on the uncorroborated testimony of a sole accomplice witness, deprivation of producible Jencks Act statements inconsistent with the witness' trial testimony can be deemed harmless error under the standard of *Rosenberg* v. *United States,* 360 U.S. 367 (1959).

6. To what extent, if any, is the government bound by a position taken by its counsel in this Court, or in a lower court, at a prior stage of the same litigation. In particular,

(a) May a concession by the Solicitor General in this Court be repudiated by the government in a lower court.

(b) May the government urge in this Court a ground for affirmance not urged in the court of appeals, or conceded by the government in the court of appeals.

(c) Do continual changes in the government's position, at the successive stages of the litigation on petitioner's motion for new trial, warrant grant of a new trial as a matter of due process, or in the exercise of

this Court's supervisory powers over the conduct of federal criminal appeals.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, is printed as Appendix B to this petition (App. 22a-23a).

STATEMENT

Undersigned counsel for petitioner Vincent Gigante is also co-counsel for petitioner Vito Genovese, who seek review of the same judgment below.

The issues as to both petitioners are similar and the same questions have been presented by each petitioner. To avoid repetition, petitioner Gigante respectfully adopts the reasons for granting the writ set forth in the petition of Genovese. Petitioner Gigante also adopts the statement of the case contained in the petition of Genovese, and adds the following information pertinent to the evidence concerning petitioner Gigante.

All of the evidence against Gigante was in the form of uncorroborated testimony of the witness Nelson Silva Cantellops. The trial court in its instructions to the jury stated:

> "We shall next consider the evidence relating to the petitioner Vincent Gigante. Only Cantellops testified with respect to him." (Tr. 1099a.)[2]

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[2] Record references herein are cited in the same manner as in the petition of Genovese:

Proceedings on the motion for new trial are cited to petitioner Genovese's appendix in the court of appeals (vols. I through IV). These citations have the suffix "a" and no prefix. Proceedings on the original trial are cited to the appendix to petitioner Genovese's brief on the appeal from conviction, which was rebound as a separate appendix volume to petitioner Genovese's brief on the original appeal from the denial of the new trial motion. These citations have the prefix "Tr." and the suffix "a".

The principal part of such testimony dealt with an alleged automobile trip made by Cantellops and Gigante to Lorain, Ohio, from which point Cantellops departed by bus for Cleveland, about a one hour's drive from Lorain, to deliver narcotics. (See Tr. 291a-93a.)

The only other evidence relating to Gigante placed him as the driver of the car in which Genovese and Cantellops proceeded up the West Side Highway to a meeting in defendant Mazzie's house in the Bronx (Tr. 338a-42a). Gigante did not attend any part of the meeting (Tr. 342a; *cf.* Tr. 350a). See *United States* v. *Aviles,* 274 F. 2d 179, 189 (2d Cir.), *cert. denied,* 362 U.S. 974, 982, *rehearing denied,* 363 U.S. 858 (1960). However, it was the evidence of Gigante's participation in the Lorain-Cleveland trip which provided the basis for the court of appeals' affirmance of his conviction. *Ibid.*

At trial Cantellops admitted that he had given the grand jury a different account of his Cleveland trip. According to that account, given in March of 1958, Cantellops had traveled from New York to Cleveland by bus, and Gigante was in no way involved.

> "Q. Did you ever swear before a jury or a grand jury, rather, a grand jury, that you took this trip by bus; yes or no? A. Yes, I reached Cleveland by bus.
>
> Q. If you will just listen to me: Did you ever swear before the grand jury that you made this Cleveland trip by Greyhound bus; yes or no? A. Yes.
>
> Q. Tell us the details of what you said to the grand jury about your trip by bus to Cleveland, when you testified about the Cleveland trip by bus—tell us what you told the grand jury, every-

thing you told the grand jury about that trip to Cleveland, and I will tell you the date, when I want you to do that.

Mr. Christy: Objection, your Honor.

The Court: Let us get the facts. Did you go by Greyhound bus?

The Witness: Now, I correct that mistake, and I rectify it—

The Court: Did you go by Greyhound bus?

The Witness: No by bus from Lorain to Cleveland, but I was riding by car from here to Lorain, Ohio.

The Court: Did you ever testify before the Grand Jury that you had gone by Greyhound bus straight from New York through to Cleveland?

The Witness: Yes, your Honor, and I had a reason to do it and I did it and I am sorry for it.

The Court: Strike it out.

Q. Let me see if I can refresh your recollection of what you testified to before the Grand Jury.

The Court: What is the point of refreshing his recollection? He has already told us that he testified before the Grand Jury that he went from New York through to Cleveland by Greyhound bus." (Tr. 626a-627a.)

At the hearing on petitioner's motion for new trial, the occasion for Cantellops' change in his story concerning the Lorain-Cleveland trip was developed in the testimony of former narcotics agent Rowan. The latter testified that his investigation of certain bus schedules had revealed a fatal discrepancy in Cantellops' account of the trip (1249a-51a). Rowan had then informed Assistant United States Attorney Tendy of this discrepancy (1253a-54a), and as a result, in June of 1958, Cantellops finally told Tendy in a private interview that he had made the trip to Lorain by car with Gigante (1254a-61a). Cantellops also told Tendy that Genovese was involved in the case (1257a, 1261a).

Tendy thereafter informed Rowan and Assistant United States Attorney Walsh of this development in Cantellops' story (1261a). Rowan's testimony as to this matter was uncontradicted. It was corroborated by agent Enright insofar as it was within the latter's knowledge (see 1510a-11a), and the government did not call Tendy or Walsh. Rowan had destroyed his notes on the matter (1249a), so that they were unavailable for production at trial.

Petitioner was released on Mandatory Release from the United States Penitentiary in Lewisburg, Pennsylvania on October 16, 1964 after serving the maximum term of sentence imposed upon him less 854 days statutory and extra good time deductions according to Title 18 U.S.C. § 4163.

He continues to remain under the jurisdiction of the United States Board of Parole until the expiration of his term of sentence less 180 days on August 21, 1966.

Under the terms of the Certificate of Mandatory Release issued to petitioner, he must report weekly to a probation officer and must remain within the limits of the United States District Court for the Southern District of New York. He may be recommitted for any breach of his parole.

Even though Petitioner's appeal has been so protracted that he has been released as aforestated, his petition is not moot. He should be afforded the opportunity to wipe this conviction from his record should a new trial be granted.

REASONS FOR GRANTING THE WRIT

As stated above, petitioner Gigante respectfully adopts the reasons for granting the writ of certiorari set forth in the petition of petitioner Genovese, since the issues concerning both petitioners are similar and the same questions have been presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November 13, 1964